

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

PETE ROMERO,

Plaintiff,

vs.

Civ. No. 98-194 MV/LCS

**KENNETH S. APFEL,
Commissioner of Social Security,**

Defendant.

**MAGISTRATE JUDGE'S PROPOSED FINDINGS
AND RECOMMENDED DISPOSITION**

This matter comes before the Court upon Plaintiff's Motion for Award of Attorney's Fees Pursuant to the Equal Access to Justice Act, 28 U.S.C. Sec. 2412, filed on May 20, 1999. The Court, having considered the pleadings, the memoranda submitted by the parties and the applicable law, proposes finding that the Motion is not well-taken and recommends that it be denied.

Proposed Findings

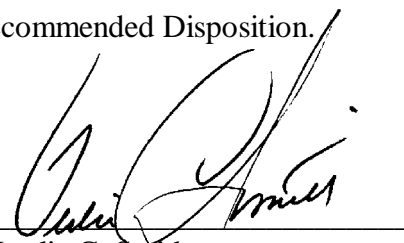
1. On April 1, 1999, the District Judge adopted the Magistrate Judge's March 9, 1999 proposed findings and recommended disposition, which recommended remand of the case because the combination of an incomplete transcript (caused by faulty recording) and apparently complexly structured questions by the ALJ left the Court unable to determine whether there was sufficient evidence to support the ALJ's determination that significant jobs existed in the national economy for people with the claimant's residual functional capacity.

2. The Plaintiff has now requested attorney's fees under the Equal Access to Justice Act. Such fees should be awarded unless the Commissioner can show that the position of the United States was substantially justified. *Pierce v. Underwood*, 487 U.S. 555, 565 (1988).

3. In the present case, the Commissioner contended that the content of the ALJ's questions and the witnesses' and claimant's answers could be inferred from context. Although I was unable to do so, I propose finding that reasonable people could differ whether such inferences as were advanced by the Commissioner could reasonably be drawn. Accordingly, I propose finding that the position of the Commissioner was substantially justified, and do not reach the issue of whether the amount of attorney's fees claimed by Plaintiff were excessive.

Recommended Disposition

I recommend that the Motion for Award of Attorney's Fees Pursuant to the Equal Access to Justice Act, 28 U.S.C. Sec. 2412 (docket entry # 26) be denied. Within ten days after a party is served with a copy of the Magistrate Judge's Proposed Findings and Recommended Disposition that party may, pursuant to 28 U.S.C. Sec. 636(b)(1)(C), file written objections to them. A party must file its objections within ten days if that party wants appellate review; in the absence of timely filed objections neither the District Court nor the Court of Appeals will review the Magistrate Judge's Proposed Findings and Recommended Disposition.



Leslie C. Smith
United States Magistrate Judge